cases. In the overall interest of justice the former course is preferable to the latter. The preferred course will place the onus on the accountable party to meet the criteria set out in the case law if restoration of the action to the list is sought. Ordinarily in the circumstances being mulcted in costs should be a relief compared to the tortious aspect.

There is reason to believe that the practice arises by reason of lack of preparation by solicitor on record or Counsel and consequent unreadiness to proceed. The predicament is then sought to be resolved by referring the matter to unwitting Counsel on the other side who, out of goodwill or maybe on the basis of mutual assistance should the latter at some subsequent time find himself to be in a like position of unreadiness, agrees to appear in Court purportedly "to mention on behalf of the former." I take the view that the practice is inappropriate, indeed undesirable. It is a device which has the effect of clogging the hearing lists; especially in the lower Courts where the practice is rampant.

I decline to entertain Counsel as "mentioning on behalf of the solicitor for the appellant". Counsel now declares that he appears for both the appellant and the respondent. I acknowledge and proceed to deliver judgment.

NG CHENG KEE & 2 ORS.

v.

LOH PENG KUNG @ LOH PENG CHIANG & ANOR.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL SUIT NO. 22-33-88]
11 JANUARY 1993

INJUNCTION: Application for mandatory injunction - Whether should be granted - Whether perpetual injunction should be granted.

PRACTICE AND PROCEDURE: Defendants raising defence during trial which was not pleaded in Statement of Defence - Acts of third parties - Whether permissible to rely on this defence.

Tort: Nuisance - Whether caused by wilful or wanton act - Loss of use of land caused by the nuisance - Measure of damages.

The plaintiffs claimed that their padi land could not be cultivated because the defendants or their servants or agents created a nuisance by constructing a new drain on the defendants land, which abutted on the eastern border of the plaintiff's land, and allowing water to flow into and flood the padi land.The second defendant claimed that since there was an existing drain in the defendants' land which exited on to the plaintiffs' land, he instructed a bulldozer driver to clear the drain in order to let water from the depressed area in the defendants' land to flow. He denied that what was constructed on the land was a new drain.The bulldozer driver on the other hand stated that what he made was a new drain and that he connected it to an old drain on the defendants' drain and made the new drain exit onto the plaintiffs' land. His evidence was that water in the old drain could not flow and when he opened the new drain the water flowed along the new drain. He further stated that it was the first defendant who instructed him to make the new drain and for it to exit on to the plaintiffs' land.

Held:

[1] The bulldozer driver (PW4) was a straightforward, honest and independant witness and his evidence was accepted. The new drain was deliberately constructed by PW4 on the instruction of the first defendant and in all the circumstances there was a wanton creation of a nuisance which injured the plaintiffs' land.

[2] The injury caused by the nuisance to the plaintiffs had been substantial and if the defendants did not take steps to prevent the flow of water through the nuisance created by them, the plaintiffs' land would be perpetually flooded and the injury cannot be adequetly remedied or atoned for by damages. Perpetual injunction against the defendants granted.

[3] The defendants created a nuisance on their land which injured and continued to injure the plaintiffs' land amounting to $10^{1}/_{2}$ relongs upto the date of trial. The damages suffered by the plaintiffs' was the loss of profit on the injured land for nine seasons at the rate of RM7,000 per season.

[Plaintiffs' claim allowed with costs. Defendants counter-claim dismissed].

Cases referred to:

Davie v. New Merton Board Mills Ltd. [1956] 1 All ER 379 ***(foll)***

Seong Fatt Sawmills Sdn. Bhd. v. Dunlop Malaysia Industries Sdn. Bhd [1984] 1 CLJ 291/[1984] 1 MLJ 286 ***(refd)***

Other sources referred to:

Halsbury's Laws of England, 4th edition, Vol. 4, para 364

For the plaintiffs - George John; M/s. George John & Co.

For the defendants - C. Shanmugaiah; M/s. C. Shanmugaiah & Co.

JUDGMENT

K.C. Vohrah J:

The plaintiffs' land, Grant 1739, Lot 1173, Mukim Semiling, Kuala Muda is roughly rectangular in shape, its western and eastern borders running north to south. Cutting almost midpoint on its eastern border is a man-made canal which runs south westwards to its western border. Below this canal (with bunds on both banks) cutting across the rectangular pieces of land is an area which used to be planted with padi and that area is low ground.

The plaintiffs claimed that this padi land below the canal (the padi land) could not be cultivated with padi from March 1988 because, they said, the defendants or their servants or agents in March 1988 created a nuisance by constructing a new drain on the defendants' land (Lot 1172, which abutted on the eastern border of the plaintiffs' land) and allowing water to flow into and flood the padi land. And they alleged that the nuisance remained even up to the date of trial.

The defendants' land, it was not disputed, is generally on higher ground except for a depressed area between its northern border next to the man-made canal and its western border next to the plaintiffs' land. It was not disputed that in March 1988 there was heavy rain in the area and the depressed area of the defendants' land was flooded causing damage to the rubber trees planted there. It was also not disputed that water from the man-made canal running along the northern border of the defendants' land entered his land. More likely than not water flowed from the canal into the defendants' land because the canal was not bunded along the defendants' side (see P1).

The second defendant claimed that since there was an existing drain in the defendants' land which exited on to the plaintiffs' land he instructed PW4 to use his bulldozer to clear the drain in order to let water from the depressed area to flow. And he said PW4 followed his instruction.

The plaintiffs prayed for a declaration that the defendants, their servant or agents had committed trespass and had created a nuisance in respect of their padi land and for the ensuing damages suffered by the plaintiffs. The plaintiffs also prayed for a mandatory injunction to require the defendants, their servants or agents to seal the point of exit of the drain to prevent water from the defendants' land flowing into the plaintiffs' land.

On the other hand the defendants counter-claimed that the plaintiffs created a nuisance when they built embankments across the boundary of their land preventing water from flowing naturally from the defendants' land along the natural passage as a result of which water became stagnant and destroyed about 3 relongs of rubber trees; they counter-claimed for special and general damages.

There is no issue of trespass in this case although pleaded in the statement of claim and I shall ignore it. The defendants brought out an issue that the flooding of the plaintiffs' padi land was caused by acts of third parties, i.e. that water from several mining pools lying beyond the properties of the plaintiffs and the

defendants and flowing through the man-made canal which runs across the plaintiffs' land had caused flooding of the plaintiffs' land. This defence is not open to the defendants as it is necessary for the defendants to plead the specific acts of third parties in their defence before they can rely on it (see *Davie v. New Merton Board Mills Ltd.* [1956] 1 All ER 379). In any event there is hardly any evidence, let alone credible evidence, that the flooding of the padi land was caused by acts of third parties.

The main issue I had to decide was whether the escape of water from the land of the defendants to the plaintiffs' land was as a result of a wilful or wanton act of the defendants or their servants or agents. Specifically, the question I had to determine was whether there was an existing drain in the defendants' land which was cleared by PW4 on the instruction of the first defendant or whether there was a new drain dug up in that land exiting on to the land of the plaintiffs by PW4 on the instruction of the first defendant.

The first plaintiff, PW2, stated in evidence that on 13 March 1988 he visited his land, Lot 1173, which was 27 relongs in area and used as a padi field. He said that he noticed that $10^1/_2$ relongs of the field (the padi land) were flooded with water. PW2 stated that he saw a new drain in the defendants' land exiting on to his land. It was connected to a bigger drain on the defendants' land. He gave evidence that his land was lower than the defendants' land but water had not previously flowed into it from the defendants' or "other peoples' land" into his land. He had purchased the land some 20 years ago and he had never seen water flow into his land from elsewhere until 1988.

PW4, Loh Ah Kiang, a bulldozer driver, stated that in March 1988 the first defendant engaged his services to make a drain of more than 1 chain. He said he used his bulldozer to dig up the earth. The drain was 3 feet wide and 4 feet deep. He said that what he made was a new drain and that he connected it to an old drain and made the new drain exit on to the plaintiffs' land. His evidence was that the water in the old drain could not flow and when he opened the new drain the water flowed along the new drain. He stated that it was the first defendant who instructed him to make the new drain and for it to exit on to the plaintiffs' land.

The first defendant, DW2, denied that he instructed PW4 to dig a new drain which exited on the plaintiffs' property. He said water was stagnating in his land and affecting his rubber trees. He said that he instructed PW4 to clear an existing drain to drain water from the depressed area and that that was done. He and his witness, DW4 (his employee), said that the said drain had been in existence on the defendants' land ever since the first defendant and his wife, the second defendant, purchased the land in 1958.

PW4 struck me as a straightforward and honest witness. He was also an independent witness. I had no reason to doubt his evidence that he was instructed by the first defendant to make a new drain on the defendants' land to exit on to the plaintiffs' land and that he did so make it. I accepted the evidence of PW2 that since the purchase of the land some 20 years prior to 1988 water never flowed from the defendants' land to his land until the new drain was constructed. A look at P1 would show that water from higher ground in the defendants' land would flow to the depressed area mentioned earlier situated within the same land. Any person is liable for a nuisance who either creates or causes it, or continues or adopts it, or who authorises its creation or continuance: **Halsbury's Laws of England**, 4th edition, Vol. 4, paragraph 364. I found in this case that the new drain was deliberately constructed by PW4 on Lot 1173 on the instruction of the first defendant (a co-owner with the second defendant) of the said land, and in all the circumstances there was a wanton creation of the nuisance which injured the plaintiffs' land (see also *Seong Fatt Sawmills Sdn. Bhd. v. Dunlop Malaysia Industries Sdn. Bhd* [1984] 1 MLJ 286 and the case law and other authorities considered therein).

The nuisance was created in March 1988 and the ensuing damage was a loss of use of $10^1/_2$ relongs of padi land; padi could not be cultivated in the padi land. What also had to be decided was whether such loss of use was a "continuing one" as pleaded. The first plaintiff had stated in evidence that for 10 seasons - for 5 years - he could not cultivate the padi land (i.e. the $10^1/_2$ relongs of land) as it continued to be flooded. He was quite specific that he had not been cultivating the land with padi since 1988 because of the drain. PW9 who

used to work on the padi land of the plaintiffs said that after 1987 he did not work on the bendang because "the fields were flooded". Neither the first plaintiff nor PW9 was specifically challenged during cross-examination on what they stated. Nor was it put to the first plaintiff that the exit of the drain had been opened and that it remained open at the date of the trial. What was suggested to PW2 was that the defendants had no alternative but to let water flow into the plaintiffs' land as the plaintiffs' land was at a lower level. The evidence of PW4, however, throughout, showed that it was clear that the new drain caused the flooding and the exit had not been closed. The first defendant in his evidence said he had closed the exit point of the drain after the plaintiffs obtained an injunction against the defendants to close it and he claimed he did not disobey the Court order. He agreed, however, that the plaintiffs' solicitors had sent a notice to his solicitors that he had disobeyed the order but he claimed that was why he obeyed the order. It is true that no committal proceedings were taken against him for breach of the injunction. There may have been a plethora of reasons for the plaintiffs not taking contempt proceedings but PW2, the first plaintiff was not asked anything about the injunction nor about its breach and the fact remains that the evidence of PW2, which I accepted, was that for 20 years before 1988 no water had entered into the plaintiffs' land and ever since March 1988 after the drain was constructed exiting on to the plaintiffs' land water has been getting into his land. A witness for the defence, DW3, said vaguely that water entered the plaintiffs' land because the first plaintiff closed his bendang "and shut the drain" on his lands. The evidence is simply not believable because the plaintiffs' padi land is lower than the bunded man-made canal cutting through the plaintiffs' land. How does one get water to flow into higher ground? And it seems highly improbable that if the plaintiffs could indeed drain the water from the padi land they would not have so drained it and continued cultivating padi for economic gain. On the balance of probability the defendants had not sealed the exit point of the new drain; they allowed water to flow through the new drain into the plaintiffs' land up to the date of the trial. And my finding was that there was continuing loss up to the date of hearing of the case.

In the result a declaration had to be made that the defendants created a nuisance on their land which injured and continued to injure the plaintiffs' land amounting to $10^{1}/_{2}$ relongs up to the date of trial.

The plaintiffs claimed damages for loss over 10 seasons for 5 years. By March 1988 harvesting was over. There remained only one more harvesting period that year of 1988 as padi was planted twice a year. From 1989 up to the date of trial 8 seasons had passed. I awarded damages calculated for 9 seasons, not 10 seasons as claimed by the plaintiffs.

For one season, on the evidence, the plaintiffs would have received on the sale price of RM49.01 per 100 kilogrammes and subsidy of RM16.54 per 100 kilogrammes on 189 sacks of about 80 kilogrammes per sack altogether RM9,001.87. Expenses accrued through sowing, ploughing, manpower assistance, costs of chemicals, harvesting, packing and loading came to RM1,787.90. Thus the profit was RM9,001.87 less RM1,787.90 i.e. RM7,223.97. This was profit for the harvest of the second season planting of 1987. I awarded RM7,000 per season for 9 seasons as a fair amount i.e. RM63,000 and an additional RM2,500 being the costs of conducting the survey of Lots 1173 and 1172 by PW1 for the damage sustained by the plaintiffs up to the date of trial.

I did not see any merit in the defendants' counter-claim. Not an *iota* of evidence was adduced to show that the plaintiffs created a nuisance which destroyed the defendants' rubber trees. And I dismissed the counter-claim of the defendants.

The injury caused by the nuisance to the plaintiffs had been substantial and if the defendants do not take steps to prevent the flow of water through the nuisance created by them, the plaintiffs' padi land will be perpetually flooded and the injury cannot be adequately remedied or atoned for by damages and I therefore granted him the perpetual injunction prayed for.

Costs to the plaintiffs.